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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

NOV 10 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j) of the)
Communications Act)
Competitive Bidding)

PP Docket No. 93-253

COMMENTS

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SUMMARY

The Commission faces an enormous task in developing a competitive bidding program that serves the objectives set forth in the Budget Act. The task is made even more difficult by the aggressive deadlines imposed by Congress. The Commission can best meet its mandate by adopting a simple and easy to administer program. Unnecessary complexities will create administrative licensing delays and endless litigation.

BellSouth's proposals are aimed at simplifying the auction process in order to meet the statutory goals, including ensuring fair treatment of all bidders. Specifically, the Commission should adopt open, oral bidding as the primary auction approach. Combinatorial bidding has a number of serious problems and should be rejected. The Commission should also revise the bidding sequence to accommodate aggregation strategies without disadvantaging individual bidders. The Commission should equalize the economic disadvantages of designated entities by installment payment plans and other economic measures rather than set-asides. The Commission should utilize administrative processes designed to limit the auctions to serious bidders. Each of these proposals is easy to administer and less subject to legal challenge.

The Commission should not adopt anti-trafficking rules and rules restricting settlement discussions and similar regulations because they will interfere with the marketplace development of new and emerging services. Such rules also create fraud incentives and expend valuable FCC resources in developing and then policing the rules.

In sum, BellSouth takes the following positions with regard to the Notice:

- **Statutory Framework** -- The Commission's tentative decisions premised primarily on maximizing revenue generation should be reconsidered and revised to comport with Congressional objectives.
- **Open Bidding** -- The Commission should utilize open bidding as the predominant auction mechanism, and as the method for PCS and other services.
- **Combinatorial Bidding** -- Combinatorial bidding should be rejected. It will exclude many bidders and thwart the Budget Act's express objective to encourage the wide dissemination of licenses among a diverse body of applicants. It will also artificially advance one particular aggregation scheme at the expense of a marketplace determination.
- **Bidding Sequence** -- The bidding sequence for PCS should be revised. All of the license blocks in a given geographic area should be auctioned before moving on to the next area.
- **Collusion/Settlements** -- There is no need for elaborate rules to prevent collusion. Legitimate settlement efforts should be encouraged as fully consistent with Budget Act objectives.
- **Designated Entities** -- Economic preferences should be used to ensure meaningful participation by designated entities. The Commission should not adopt spectrum set-asides. Eligibility requirements for the targeted groups should be unambiguous and fair to avoid protracted litigation and abuses.
- **Transfers/Assignments** -- The Commission does not need to restrict transfers and assignments of licenses (or spectrum) awarded in a competitive bidding program.
- **Performance/Warehousing Requirements** -- The existing performance/build-out requirements for each service are adequate.
- **Application Requirements** -- Adjustments should be made to application requirements to assure that serious, qualified bidders are not excluded. A "letter perfect" requirement for the short-form application is not needed. The rules should permit minor amendments so that qualified winning bidders are not needlessly denied licenses.
- **Administrative Processing Requirements** -- The Commission should examine ways to ease the filing requirements and processing burdens.

- **Upfront Payments** -- The upfront payment amount should be revised to avoid anomalies and situations where the upfront amount is unreasonable. It should not be so low as to be unsuccessful in weeding out non-serious bidders; however it also should not be so high as to unduly burden serious bidders.
- **Deposit Payment Timing** -- Payment of the 20% deposit for winning bidders should be due before the auction participants are dispersed. Requiring the deposit at auction is the most practical approach to assuring that winning bidders are qualified. This ensures that the Commission and other bidders are not inconvenienced by deposit defaults.
- **Unserved Areas** -- As to those Unserved Area cellular markets for which applications have been accepted for filing in Phase I, bidding eligibility should be limited to those parties who initially applied.
- **Intermediate Links** -- The Commission should not require competitive bidding for so-called "intermediate links." Competitive bidding could negatively impact the provision of quality service without corresponding benefits.

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COMMENTS

BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Enterprises, Inc. ("BellSouth"), by their attorneys, hereby comment on the Commission's Notice of Proposed Rulemaking (the "Notice") (FCC 93-455, released Oct. 12, 1993). In the Notice, the Commission reaches a number of tentative conclusions and discusses areas in which further decisions must be made in order to develop a program of competitive bidding for the awarding of radio licenses. ^{1/}

Congress has imposed extremely tight deadlines on the Commission in the Budget Act. ^{2/} The Commission must adopt competitive bidding regulations

^{1/} The Notice has been issued pursuant to the congressional mandate in Title VI of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 379 (Aug. 10, 1993) ("Budget Act"). In that legislation, Congress amended the Communications Act, inter alia, to provide the Commission with express authority to employ competitive bidding procedures to choose in certain circumstances from among mutually exclusive applications for initial licenses. Section 6002(a) of the Budget Act amends Section 309 of the Communications Act, 47 U.S.C. § 309, by adding new § 309(j), entitled "Use of Competitive Bidding." See Budget Act, sec. 6002(a), § 309(j), 107 Stat. at 387-92.

^{2/} Congress has required that implementing regulations for its competitive bidding authority be in place by March 8, 1994. Budget Act, sec. 6002(d)(1), 107 Stat. at 396. It has also required that the Commission "commence (continued...)

that serve several significant Congressional objectives within less than four months from today. The Commission can meet these aggressive deadlines in a timely and sustainable manner only if it adopts a simple and easy to administer program. Complexities will create administrative licensing delays and unnecessary litigation and should be avoided. The BellSouth auction proposals below are aimed at achieving these goals and the objectives of the new statute. ^{2/}

I. THE STATUTORY FRAMEWORK FOR THIS RULEMAKING

In authorizing spectrum auctions, Congress has required the Commission to promote the following specific objectives:

- A) *the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;*
- B) *promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;*

^{2/}(...continued)

issuing licenses and permits" in the PCS service by May 7, 1994. Sec. 6002(d)(2)(B), 107 Stat. 396-97.

^{3/} On September 14, 1993, BellSouth filed a Petition for Rulemaking ("Petition") outlining a number of suggestions for the implementation of a competitive bidding scheme for new radio services like the PCS services. Based on the Notice and the need to reflect a broad consensus in the final rules, BellSouth has reconsidered and adopted some of its remaining proposals to the overall scheme outlined in the Notice, and has modified certain positions on other issues, as discussed below.

- C) *recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and*
- D) *efficient and intensive use of the electromagnetic spectrum.* ⁴

The Commission must develop a competitive bidding program that serves, in some fashion, all of these congressional objectives. Overemphasis on any one objective simply will not meet the congressionally mandated requirements. The Notice, however, focuses its analysis all too often on the expected propensity of certain measures to generate the highest bid, and thus maximize revenue for the auctioned spectrum. This focus ignores the Budget Act's specific prohibition on relying "solely or predominately on the expectation of Federal revenues" in prescribing auction regulations. ⁵ Thus, certain changes to the Commission's proposals are required to satisfy the new statute.

II. THE AUCTION PROCESS

As discussed above, to meet congressional deadlines, the Commission must formulate a general bidding structure that is both simple and easy to

⁴ Budget Act, sec. 6002(a), § 309(j)(3)(A)-(D), 107 Stat. at 388 (to be codified at 47 U.S.C. § 309(j)(3)(A)-(D)). Competitive bidding is limited to services in which the principal use of the licensed spectrum is for the provision of subscriber services. Budget Act, sec. 6002(a), § 309(j)(2), 107 Stat. at 388 (to be codified at 47 U.S.C. § 309(j)(2)). Based on this limitation, the Commission proposes to exempt virtually all mass media and public safety radio services from auction. (Notice at ¶¶ 23 and 26.) Moreover, the Commission's competitive bidding authority expires in September 1998. § 309(j)(11), 107 Stat. at 392 (to be codified at 47 U.S.C. § 309(j)(11)).

⁵ Budget Act, sec. 6002(a), § 309(j)(7)(B), 107 Stat. at 390 (to be codified at 47 U.S.C. § 309(j)(7)(B)).

administer. To that end the Commission should (1) abandon its proposal to utilize combinatorial bidding; (2) reorder the sequence of auctions; and (3) recognize and encourage bona fide settlements among qualified applicants by adopting rules designed only to avoid abuses similar to those experienced in other radio services. Oral open bidding should be the primary auction method used. Analyses favoring other methods overemphasize revenue generation and fail to adequately weigh the achievement of other specified legislative objectives. Thus, they are seriously flawed. Adoption of a complex and convoluted scheme would ill-serve the public interest and likely lead to serious and lengthy administrative delays.

**A. The Commission Should Utilize Open Oral Bidding
As the Predominant Auction Mechanism Generally,
And As The Method For PCS and Other Services**

BellSouth strongly supports the decision in the Notice to rely primarily on open oral bidding as the basic auction method. The advantages of oral bidding are numerous.^{9/} Significantly, oral bidding is the easiest to administer; issues of keeping all sealed bids totally secure before opening of the bids, the establishment of minimum or reserve prices, and the need for additional rounds of bidding are avoided. As the use of auctions remains untested, oral bidding is open and is thus perceived as more fair.

^{9/} The only identified problem with open oral bidding is the possibility that it "may be more subject to manipulation than sealed bidding when there are fewer bidders." (Notice at ¶ 38.) As discussed infra, any abuses to the open bidding process can be easily addressed. Moreover, the Commission should in fact encourage legitimate settlement efforts and negotiations between bidding applicants which expedite the issuance of licenses and comport with Budget Act objectives.

Open auctions are particularly appropriate for new, broadly defined radio services such as PCS. In these services, the licensee has the discretion to select an appropriate technology and to determine the products and services it offers to the public. For such new services, the value of particular licenses is still quite speculative. Smaller, less-capitalized companies and new entrants will be better able to assess in oral bidding how their own valuations for particular markets compare to the actual ongoing bidding. In turn, they will be better able to test the resolve of their competitors and plan the uses of limited capital on the basis of this openly available information. Given the Commission's statutory obligation to promote economic opportunities for several groups of so-called "designated entities", oral bidding will be important in achieving this objective.

Bidders also can better plan the use of limited capital by spending in any given auction only the amount actually necessary to outbid others. In sealed bidding, they must bid the amount anticipated to be needed to win the auction. There is a "winners curse" associated with sealed bidding. Often, the bidder bids much higher in a sealed bid than would have been necessary to outbid the next highest bid in an oral auction. This problem would be particularly burdensome on parties of limited means. It would tie up more of their limited capital than necessary to achieve participation in any given service.

Until the Commission has developed a substantial body of experience with competitive bidding that could justify other approaches, oral open bidding is the easiest, most expeditious approach to utilize.

B. The Commission Should Not Use Combinatorial Bidding

The Commission has asked for comment generally on the use of bidding for groups of licenses, so-called "combinatorial bidding". The Commission proposes for the Broadband PCS licenses to use combinatorial bidding to award licenses in the two 30 MHz MTA blocks on either a nationwide or an individual basis. ⁷⁷ BellSouth strongly opposes use of any combinatorial bidding and urges its rejection. Combinatorial bidding adds significant complexity to the process of bidding and limits diverse bidder participation.

As a threshold matter, the objectives of the Budget Act and the legislative history speak strongly against rules that would artificially encourage and facilitate license aggregation. Section 309(j)(3)(B) demands that the implementing regulations avoid excessive concentration of licenses. It requires the Commission to promote the dissemination of licenses among a wide variety of applicants. ⁷⁸ However, the proposed combinatorial bidding could have the exact opposite result. In Broadband PCS, for example, combinatorial bidding could result in 102 MTA licenses (what are expected to be the most valuable PCS

⁷⁷ The Commission proposes to hold two auctions, one using open oral bidding for individual licenses, and one using sealed bids for the group of licenses, and then to compare the aggregated total of the individual bids against the highest bid for the group in determining who should be awarded the license. (Notice at ¶¶ 57-58.)

⁷⁸ Moreover, the Conference Report also suggests that license concentration is a primary reason why designated entities have not had a reasonable chance at participation in new services. See H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 482 (1993); see also H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 254 (1993).

licenses) being held by only two licensees! ^{9/} There is simply no legislative basis on which the Commission could justify the use of combinatorial bidding to facilitate such result.

The primary, overriding disadvantage of any combinatorial bidding scheme is the likely exclusion from the process of many potential licensees. In virtually every combinatorial auction, the smaller entrepreneur with limited capitalization will be severely disadvantaged. Because of its lack of investable funds it will not be able to bid on any combination of licenses established by the FCC as effectively as it can bid on one or two of the licenses included in the combination. If combinatorial bidding is used, the small entrepreneur will be at risk of not participating in a service. And such entrepreneur will be excluded even though it placed the highest value on one of the individual licenses at issue. ^{10/}

In many of the services subject to auction one or more classes of potential bidders may not be legally eligible to place a combinatorial bid. For

^{9/} All of the remaining participants, including designated entities, would be left with the "opportunity" to compete on a second-class level for the remaining licenses in these burgeoning industries.

^{10/} It has been suggested that the auction "marketplace" will assure that such "excluded" entities are still included in the radio service. This assumes that a bidder who successfully wins a combinatorial bid will be forced to make alternative arrangements involving losing bidders in the development and provision of new services in order to expedite service to all parts of the nation relatively simultaneously and thus get full value out of its license investment. However, franchise arrangements are not adequate replacements for individual licenses in ensuring the rapid, nationwide deployment of technology. Moreover, such franchise arrangements may significantly undermine the regulatory oversight process, as the FCC is left to look to a single licensee to control all parts of the nation, rather than having enforcement capabilities over all of the direct system constructors and service providers.

example, in Broadband PCS, restrictions are imposed on the license blocks that cellular licensees may bid on in their service areas. If combinatorial bidding is used, these carriers will be at risk of losing MTA licenses for which they were both eligible and the highest bidder -- if a non-cellular carrier offers more on the group of MTA licenses in a sealed bid. Cellular carriers will be without effective recourse to avoid this result. They will not be eligible to place a combinatorial bid because there are some MTA licenses for which they may not apply. Further, they will not be able to influence the outcome because some individual MTA licenses will be valued in oral auctions in which they are not eligible to participate. There is no justification for excluding such individual market bidders from effectively participating in the process.

The Commission justifies the use of combinatorial bidding by arguing that bidding for groups of licenses "may reduce the transactions costs in efficiently aggregating licenses." (Notice at ¶ 57). It also suggests that combinatorial bidding will allow bidders to fully express the interdependence of license values and thus assure that "groups of licenses are assigned to their highest valued use." (Id.) Neither of these arguments justifies the use of this approach or the adverse impact on achievement of legislative objectives set forth in the Budget Act.

Combinatorial bidding certainly is not necessary for the efficient achievement of any aggregation of licenses which may be appropriate or desirable. A "group" bidder who wants to aggregate licenses included in the combinatorial auction can achieve the same result in an oral auction. It must simply make the

highest bid in each auction for each license in the combined group. ^{11/} Such aggregation is achieved with a degree of certainty at the time that each bid is made that simply does not exist with the use of sealed combinatorial bids. ^{12/}

It is also not fair to assume that a combinatorial bid that is higher than the sum of the individual license bids will, in each case, represent the "highest valued use" of the auctioned spectrum. For one thing, such a combinatorial bid process ignores the value of the award of the individual licenses to a wide variety of winning bidders, including designated entities. The strong congressional objective for encouraging economic opportunities and diverse participation suggests that this value to society is substantial. Nor does the sum of the winning oral auction bids necessarily represent the highest value that any one winning bidder places on the winning licenses. Rather, it represents only the value that each winning bidder had to bid at oral auction to be the highest bid. Thus, the combinatorial bidder may win the license only because it anticipated

^{11/} In fact, to the extent that revenue generation is appropriately considered, it may be that the presence of the "group" bidder in the individual auctions will actually raise the aggregate prices achieved in the licenses awarded. By making the "group" bidder participate in the individual license auctions, the last bid of the party that would otherwise win the auction in the group bidder's absence may now not be enough. Such bidders will have to continue the bidding at higher levels than would be achieved in the group bidder's absence. Moreover, oral bid aggregation of licenses allows bidders to avoid the so-called "winners curse." Such bidders thus will be able to use what capital they "save" in winning some licenses with bids lower than anticipated to bid at prices higher than anticipated for other licenses.

^{12/} Business certainty is extremely important and of substantial value to all bidders. With a two-step combinatorial bidding process, there is virtually no certainty for any bidder when either the oral or sealed bids are made.

higher winning bids for some of the licenses, and not because it places a higher value on all or any one of them. ^{13/}

Moreover, in order to establish combinatorial bidding the FCC must define the combination that will be bid on. ^{14/} By making such choice, the Commission will necessarily establish boundaries on the services that may or may not reflect the regulatory regime established for the service. This will clearly complicate the development of new services.

In the case of Broadband PCS, the Commission has consistently refrained from imposing rigid definitional barriers on the services to be provided or the method of providing them. Yet by establishing a combinatorial auction only for a nationwide 30 MHz PCS combination, the Commission will effectively decide to assist one type of aggregation -- nationwide -- at the expense of virtually every other combination. ^{15/} This licensing decision puts at substantial risk the

^{13/} For example, a cellular carrier's evaluation of the value of each of the licenses in the group will be irrelevant to whether the group bidder or the individual bidders obtain the licenses. The cellular carrier is not eligible to bid on all licenses.

^{14/} Otherwise, the possible combinations on which bids might be taken would be so numerous that it would be virtually impossible to sort out the winning bidder. For example, three applicants desiring to win one of the 10 MHz licenses in a BTA might choose to bid, respectively on one 10 MHz block in all BTAs in an MTA, one 30 MHz block and that 10 MHz block in the MTA, and all four 10 MHz blocks in one of the BTAs. Under this scenario, how would the Commission decide who won the bid for that single 10 MHz block, in competition with the winning bidder in the BTA auction for the 10 MHz block?

^{15/} A nationwide license is inconsistent with the cellular industry's experience. Some cellular companies have aggregated systems over regional areas; but this aggregation occurred gradually over the time periods in which the Commission was rolling out licenses, from the larger to the smaller markets. The demands on capital necessary to achieve that aggregation did not delay service to any given area; instead, economic efficiencies and the more
(continued...)

possibility of other licensees creating regional or local combinations. It will essentially define the structure that the PCS industry ultimately achieves. There is no evidence that any particular initial aggregation (across MTA or BTA lines, nationwide or regional) is clearly appropriate to the success of all or any part of PCS. Therefore, no basis exists for dictating at the outset any particular approach to spectrum aggregation. ^{16/}

Any bidder who determines that a particular regional or nationwide license is needed for it to achieve its objectives can and should participate in the bidding for the various individual licenses. This is the simplest, fastest and most effective way for each applicant to accomplish its aggregation strategies. This approach will preserve the broadest possible participation in the auction for each of the individual licenses.

C. The Commission's Bidding Sequence Should Encourage Efficient Spectrum Utilization

License aggregation should not be an overriding issue for the Commission's competitive bidding rules. But the rules need not impede reasonable efforts to aggregate licenses when such strategies can be justified by reference

^{16/}(...continued)

gradual evolution of cellular service dictated aggregation strategies. In the case of highly capital intensive PCS, however, if any single entity is successful in achieving a group bid higher than the individual bids, that party's ability to dedicate resources throughout the nation to the simultaneous construction of a PCS system will be severely tested.

^{16/} The Commission asks whether it should also adopt other combinations (see Notice at ¶¶ 61-62), but the problem with any combination is that it defines a level of aggregation that may or may not be in the public interest -- something that can be best decided on an individual bidder basis.

to other congressional objectives. ^{17/} Rules that allow parties to aggregate licenses through the auction process are justified if they also allow those whose plans do not include aggregation to participate on an equal footing. The appropriate sequencing of licenses is such an area. BellSouth believes that a change to the Commission's proposed sequencing order for PCS is needed to provide for efficient aggregation opportunities. ^{18/}

The Commission can reasonably expect that PCS operations may aggregate across geographical lines (aggregating MTAs in a region, or even nationwide, or aggregating BTAs within an MTA) and along spectrum lines (aggregating 10 or 20 MHz blocks into a larger 30 MHz block), or both. By auctioning sequentially by frequency block, as proposed by the Commission, bidders interested in aggregating geographically around large markets are seriously disadvantaged. For example, at the end of the Block A auction for the New York

^{17/} For example, aggregation can in some cases facilitate the licensee's ability to deploy certain technologies, or increase the intensity of spectrum utilization, or promote economic opportunity and competition. Thus, Congress does allow the Commission to issue nationwide and regional, as well as local licenses and permits under the competitive bidding scheme. Budget Act, sec. 6002(a), § 309(j)(6)(F), 107 Stat. at 390 (to be codified at 47 U.S.C. § 309(j)(6)(F)).

^{18/} For the emerging Broadband PCS services, the Commission has proposed to auction each of the two 30 MHz MTA blocks sequentially, with all MTAs in Block A being auctioned first, followed by all MTAs in Block B. (Notice at ¶ 120.) While less clear in the Notice, the Commission apparently intends to auction each of the other blocks sequentially as well so that all of the licenses in any given block are auctioned before any licenses in the next block are available. (See id. at ¶ 52.) The Commission also proposes to auction the MTAs (or BTAs within an MTA) in order of size, with the largest MTAs (presumably by population) auctioned in each block first. (See id. at ¶ 53.) Using this approach, the Block A New York MTA license will be awarded first, followed sequentially by the Block A license for each of the other MTAs, down to those covering largely rural areas, before the Block B New York MTA license is auctioned.

MTA, only the winner of that auction may be confident as to the other smaller markets on which to bid. Every other bidder who still hopes to win the Block B New York MTA license will know neither what smaller markets to bid on or how much capital to save from the smaller market bidding to be able to participate with some success in the Block B New York MTA auction.

Similarly, the proposed sequence also makes spectrum aggregation within a BTA difficult for all bidders. For example, the winner of a Block E 10 MHz BTA license in New York must carefully budget his capital in bidding on the entire balance of the Block E spectrum. It must save capital so it can get an opportunity to bid for the next, and perhaps critical, Block F 10 MHz BTA license in New York. Such winner may be better off being able to utilize its full resources to bid on the Block F or Block G New York BTA license before it has to dedicate any other resources to smaller markets for the Block E license.

Assuming interoperability of equipment across one or more of the spectrum blocks, the proposed sequential approach also adversely impacts a party's ability to plan a bidding strategy for smaller markets associated with the larger ones. If all licenses in a block are auctioned before moving on to the next block, one of the smaller market licenses will be auctioned before the successful bidder for the other larger market licenses is known. This will adversely impact capital resource planning for both markets.

The fact of the matter is that under the Commission's block by block sequencing approach, most bidders will find it virtually impossible to reasonably budget for their strategic markets. The proposed approach will also disadvantage those less capitalized "designated entities" whose interest and likely successes will be focused on smaller, and probably less pricey, markets. Block

bidding necessarily keeps some of the "well-heeled" bidders in the auction process for potentially strategic licenses in the smaller markets. However, if all of the licenses in the larger markets are auctioned at the same time, many of those larger bidders may no longer have any strategic interest in some of the smaller markets. By sequencing licenses in the order in which they are likely to have greatest value, i.e., all licenses in a geographic area at the same time, smaller bidders are given a better chance to obtain licenses.

**D. While Rules to Prevent Collusion Are Not Needed,
Limits on Settlement Remuneration May be
Appropriate**

The Notice has focused on the potential for "collusion" among bidders as the single purported disadvantage of oral bidding. Comment is requested on whether rules are needed to safeguard against such efforts among applicants and/or potential bidders. The Commission is concerned that the very openness of oral bidding would allow potential eligible bidders to get together and agree to "split" the pool of available licenses without bidding the price up. The Commission notes the impact of such conduct on revenue generation from the auction: "[s]uch collusion reduces the return since the party designated to win could bid well below the value of the item without fearing that it would be outbid." ¹⁹

In BellSouth's view, the Commission needs to refocus its thinking in this area. Information sharing and pre-bidding negotiations should not be

¹⁹ (Notice at ¶ 38.) The Commission later notes its view that anti-collusion rules "would help ensure that the government receives a fair market price for the use of the spectrum." (Id. at ¶ 93.)

condemned. ^{20/} The Commission should instead continue to encourage legitimate settlements and inter-applicant negotiations to expedite the licensing process. Separate rules in this area are needed only to protect against "revenue shifting" through abusive, speculative filings, and not against cooperative efforts to reach settlements and avoid mutual exclusivity.

The possibility of what the Commission calls "collusion" clearly does not have the same importance under the Budget Act as it would under other auction regimes. ^{21/} In a typical auction, achievement of the highest price is the primary objective of the auction. But maximizing revenues is not the sole or even the predominant purpose of spectrum auctioning. Indeed, many licenses (for example, those for which there are no mutually exclusive applications) will not be subject to auctions, and will continue to be issued "for free". ^{22/}

^{20/} For example, it is suggested that the Commission could prohibit bidders from sharing information or otherwise discussing with one another any information regarding the substance of bids. (See Notice at ¶ 93.) But it is this very openness and sharing of information that makes oral bidding most effective in advancing the economic opportunities for smaller, less informed companies who do not have the vast resources to establish bidding analyses otherwise available to larger bidders.

^{21/} The Commission itself notes that Congress did not mention the need to prevent collusion in the competitive bidding process as one of the purposes for which regulations should be designed. (See Notice at ¶ 93.) Of course, real bid-rigging and other forms of collusive bidding would constitute per se violations of the Sherman Act, 15 U.S.C. §§ 1-3. Thus, to the extent that any party's conduct reaches the stage of criminal "bid-rigging" in an FCC auction, existing laws and regulations can, and should, be used to punish such activities. Additional regulations are not needed as part of the Commission's competitive bidding regulations to punish those who engage in criminal collusion.

^{22/} See Budget Act, sec. 6002(a), § 309(j)(1), 107 Stat. at 390 (to be codified at 47 U.S.C. § 309(j)(1)). Had Congress wanted to create revenue maximization from the spectrum, it could have established some form of license royalty structure for all licenses, even those for which no auction was held,
(continued...)

Moreover, the Budget Act expressly requires the Commission to continue to encourage "negotiation[s]" and other means to eliminate mutual exclusivity among applicants. Such actions also eliminate the need for auctions and any revenue generation from the license award. ^{22/} Negotiations among applicants to reach agreements that might, under other circumstances, have the appearance of collusion are thus expressly endorsed by Congress as a licensing efficiency to be encouraged. Legitimate settlement efforts therefore should not be thwarted. Settlements avoid administrative delay, allow for the rapid and intensive use of the spectrum and recover some portion of the value of spectrum at far less cost in terms of public resources and time than could possibly be attained through the auction. ^{24/} Thus, settlements fully comport with Budget Act objectives.

Some regulations have been found necessary in other circumstances in which full market settlements have been encouraged. These rules are designed to discourage the abusive filing of applications based on short term gain out of a

^{22/}(...continued)

perhaps based on the values achieved at auction. The fact that it did not do so further confirms that revenue generation was but one objective of the statute, and certainly not the primary one.

^{23/} Budget Act, sec. 6002(a), § 309(j)(6)(E), 107 Stat. at 390 (to be codified at 47 U.S.C. § 309(j)(6)(E)). Again, it is only the Commission's desire to obtain the theoretical maximum aggregate dollar amount that might have been achieved in the absence of such a settlement that remains unsatisfied.

^{24/} It is noteworthy that both the wireline and non-wireline (in the larger markets) cellular industries enjoyed substantial benefits from the ability to cooperatively settle and divide interests in markets without hearings and/or lotteries. Such settlements save capital and personnel resources through avoidance of administrative delays. In fact, the Commission's rules and statements are often designed to assure that when the numbers of interested eligible parties are small enough, such settlements can be achieved.

settlement rather than participation in the particular radio service. ^{25/} Simple rules can be adopted to limit settlement cash payments to those reasonable out-of-pocket expenses actually incurred during the licensing process. ^{26/} Rules could also be imposed which would limit equity participation in the licensee that is given to settlement participants. Such interests would not be transferrable separate from the transfer of the license for some reasonable holding period (avoiding the wholesale after-market in "minority" interests that occurred in the smaller cellular markets).

These reasonable limitations should serve to discourage the mass filing of applications just to get a "piece of the action" out of the auction process. By limiting the applicants at the auction to those seriously interested in bidding on the licenses in question, the possibility of legitimate full market settlements can also be encouraged.

III. THE TREATMENT OF "DESIGNATED ENTITIES"

The Budget Act directs the Commission to promote economic opportunity and competition by, among other things, disseminating licenses among a wide variety of applicants. These should include small businesses, rural telephone companies, and businesses owned by members of minority groups and women. In

^{25/} This would protect against achievement of unjust enrichment windfalls which would occur if part of the "settlement" involved profits to parties in order to keep them out of, or buy their removal from, the auction process. Such settlements effectively utilize the ultimate winning applicant's funds to endow such settlements rather than the U.S. Treasury. In such case, the loss of some of the value of the license from the Treasury to private parties rather than to the improvement of service, is a legitimate concern.

^{26/} See, e.g., 47 C.F.R. § 73.3525 (setting forth rules governing agreements for removing application conflicts in the radio broadcast services).

adopting implementing regulations, the Budget Act requires the Commission to consider various measures to promote these objectives.

BellSouth strongly endorses the adoption of several economic preferences designed to equal the auction playing field for designated entities. Such preferences assist those who may not have access to the capital needed to participate effectively in a competitive bidding scheme. Such economic benefits will foster Congress' objective that the designated entities have the opportunity to effectively participate in the licensing process. They are also the most simple approaches to develop and administer.

BellSouth is equally strong, however, in its opposition to the proposed spectrum set-aside for Broadband PCS. Set-asides will create substantial complexity. They will likely be unsuccessful in achieving Congress' objectives for a wide dissemination of licenses. They will also likely result in administrative and judicial delay. Nothing in the legislation suggests congressional intent to guarantee any designated group of bidders with a license. Only a fair opportunity to compete with others in the licensing process is required. Licensing schemes using these exclusionary devices may create "spectrum ghettos" rather than achieve their intended purpose.

A. Economic Preferences and Not Set-Asides Should Be Used To Insure Meaningful Participation By Designated Entities In the Competitive Bidding Structure

Congress wanted to assure an equitable distribution of licenses and economic opportunity for a wide variety of applicants in the competitive bidding system. However, it is equally clear that Congress did not intend to dictate by statute that the Commission issue specific licenses to specific individuals or

companies. The regulations that are adopted should therefore be premised on assuring that the competitive bidding scheme does not exclude certain groups or classes of potential licensees. There is no basis for guaranteeing such groups any block of spectrum.

Preferences should be focused on leveling the opportunity for capital formation that will be essential to participation in the auctions for licenses for most emerging services. Using this approach, members of designated groups can compete relatively equally for any and all licenses made available by auction.

The Small Business Advisory Committee ("SBAC") has recognized that the principal imbalance in an auction is the "depth of the wallet" that various entities may call upon.^{27/} It has suggested a variety of means for leveling the bidding capability of designated entities. Recommended measures include installment payments, the use of credit facilities in meeting deposit and upfront payments, the recognition of non-standard financing entities to support financial qualifications tests, and other credits and enhancements.^{28/} BellSouth strongly believes that these types of economic preferences are the most effective means of ensuring an equal opportunity to participate in the auction process. Such participation best achieves fair representation by the targeted groups in the provision of the emerging services.

^{27/} See FCC Small Business Advisory Committee, Report to the Federal Communications Commission Regarding GEN Docket 90-314, at 2 (Sept. 15, 1993) ("SBAC Report").

^{28/} See *id.* These suggestions address the principal problems which the SBAC has determined are facing the designated entities: undercapitalization, concentration of ownership and capital formation.